EXXONMOBIL EXPLORATION AND PRODUCTION MALAYSIA INC

v.

PETROKAPAL SDN BHD; SAFEMAL DRILLING SDN BHD (THIRD PARTY)

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[CIVIL SUIT NO: D8-22-59-2005]
28 JANUARY 2008

CIVIL PROCEDURE: *Action - Consolidation of actions - Breach of contract - Indemnity clause - Whether joint trial inexpedient*

CIVIL PROCEDURE: *Transfer - Application for - Joint hearing of actions - Breach of contract - Indemnity clause - Whether joint trial inexpedient*

This was an application by the defendant to have this case tried jointly with a suit pending in the Kuala Terengganu High Court ('Kuala Terengganu suit'). The present suit involved a breach of contract between the plaintiff and the defendant in respect of the hire of a vessel belonging to the defendant in the Kuala Terengganu suit. The plaintiff had hired the defendant to transport goods and supplies from the shore to an oil rig off Terengganu; the breach allegedly occurred from a collision by the vessel with the oil rig. The plaintiff's claim essentially in this suit was based on the indemnity written into the contract entered between them for the purpose mentioned called the Vessel Hire Contract. The plaintiff alleged that art. 15 of the said contract set out the defendant's liability to indemnify the plaintiff with respect to the loss it suffered from the collision. The Kuala Terengganu suit involved a claim by the owner of the rig against the owner of the vessel for the damage to the rig. The operator of the rig, the co-plaintiff in the Kuala Terengganu suit who was brought in as the third party in this suit, supported the defendant's application to transfer the Kuala Terengganu suit to be heard jointly with this suit.

Held (dismissing the application):

(1) The main objective in having the cases heard jointly was the saving of costs and time, with the interest of the parties uppermost. It was clear that the plaintiff's claim was essentially

an enforcement of a claim in a simple contract to transport the plaintiff's supplies and materials from the shore to the oil rig in the open sea. It was also clear that in the main the plaintiff was enforcing the indemnity clause in art. 15 of the Vessel Hire Contract, whereby the defendant was liable to indemnify the plaintiff in respect of any damages regardless of "whether it is foreseeable or unforeseeable, imposed or suffered by any party and irrespective of any action, inaction or negligence". Although it was true that a joint trial may be able to resolve all the issues for all the parties in the two suits in one trial, this would necessarily mean doing it at the expense of the plaintiff in this suit for its claim involved a simple straightforward enforcement of the indemnity clause under art. 15 of its agreement with the defendant. A joint trial would deprive it of its right to have its claim adjudicated upon soonest. It was inexpedient under the circumstances to have this case heard jointly with the Kuala Terengganu suit. (paras 8, 9 & 10)

Legislation referred to:
Rules of the High Court 1980, O. 4

For the plaintiff - Chang Wei Mun (Natariah Izra with him); M/s Raja Darryl & Loh
For the defendant - Alan Adrian Gomez; M/s Tommy Thomas
For the 3rd party - K Prakash; M/s Shook Lin & Bok

Reported by Suresh Nathan

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: *(Ex-tempore)*

[1] This is an application by the defendant to have this case tried jointly with a suit now pending in Kuala Terengganu High Court.

[2] Counsel for the applicant has assured the court this is not an application for consolidation under O. 4 of the Rules of the High Court 1980 although the application says it is made under O. 4.

[3] The present suit involves a breach of contract between the plaintiff and the defendant in respect of the hire of the vessel belonging to the defendant in the Kuala Terengganu suit. The plaintiff had hired the defendant to transport goods and supplies from the shore to the oil rig operated by the plaintiff off Terengganu. The breach allegedly occurred from a collision by the vessel with the oil rig.

[4] The plaintiff's claim essentially in this suit is based on the indemnity that is written into the contract entered between them for the purpose mentioned called the Vessel Hire Contract. The plaintiff alleged in its statement of claim that art. 15 of the said contract sets out the liability of the defendant to indemnify the plaintiff with respect to the loss it suffered from the collision. Specifically this is pleaded in para. 10 of the plaintiff's statement of claim which read as follows:

> 10. The terms of the said Vessel Hire Contract are, *inter alia* as follows:
>
> 10.1 Article 9.2.1 provides that the entire performance, operation, navigation, management and direction of the Defendant's Vessel shall be under the Defendant's control and it shall be the sole duty of the Defendant to determine at all times whether operations can be safely continued or undertaken;
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> 10.2 Article 10.1.1 provides, *inter alia*, that loading and discharging of cargo shall be under the supervision and control of the Master;
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> 10.3 Article 10.2 provides that the Defendant's Vessel shall load or discharge materials and supplies at such berth, platforms, drilling vessels or installations provided the Defendant's Vessel can always lie afloat safely;
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> 10.4 Article 15.4.1 provides as follows:
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> (a) that the Defendant shall be liable for and indemnify, defend and hold harmless the Plaintiff from and against Liabilities which arise in any way in connection with;
>
> (i) the said Vessel Hire Contract;
>
> (ii) the services provided thereunder;
>
> (iii) the Defendant's Vessel; or
>
> (iv) the presence upon the Defendant's Vessel of any person employed, retained or invited by the Defendant,

A and which are based on actual or alleged loss of or damage to property of any third party.

The term Liabilities under this Article 15.4.1 is defined to include, *inter alia*, all liabilities (whether actual, consequential, direct, indirect, punitive, exemplary, special or otherwise) regardless of whether such liabilities are foreseeable or unforeseeable, imposed or suffered by any party and irrespective of any action, inaction or negligence.

10.5 It is an implied term of the said Vessel Hire Contract that the Defendant would exercise reasonable skill, care and diligence in the performance of all its obligations under the said Vessel Hire Contract especially in relation to the operation of the Defendant's Vessel.

The Plaintiff shall refer to all the terms of the said Vessel Hire Contract at trial for its full terms and effects.

[5] The Terengganu suit involves a claim by the owner of the rig in negligence against the owner of the vessel for the damage to the rig. The operator of the rig is the co-plaintiff in that suit and the operator of the rig has been brought in as the third party in this Kuala Lumpur suit. The third party supports the defendant's application to transfer the Kuala Terengganu suit to be heard jointly with this suit.

[6] The application is opposed by the plaintiff in this suit on the following grounds:

1. The parties are different.
2. The cause of action in both suits is different. The Kuala Lumpur suit is an action *in personam* whereas the Kuala Terengganu suit is an admirality action *in rem*.
3. The reliefs claimed in both actions are different. In the Kuala Lumpur action the claim is for losses of down time in production whereas in the Kuala Terengganu action the claim is for cost of repair to the rig.
4. There will be no saving of time for the majority of parties taking into account that there is only one common party in the Kuala Lumpur suit.

5. By an order dated 15 February 2007 this court had already agreed that certain documents of the plaintiff are confidential. Having these two actions tried together would expose these confidential documents to more parties.

[7] Reply

1. Both actions arose out of a collision between the vessel and the rig.

2. There are common questions of facts involved.

3. The defence pleaded by the defendants in both suits are similar as it involves a common question of who caused the collision.

4. To have the matters tried together would save judicial time and cost.

5. The fact that the only common party is the third party should not prevent a joint trial or consolidation of suits.

6. The reliefs that is claimed in both suits arise out of one common collision between the vessel and the rig.

7. In so far as the confidentiality of the documents is concerned we submit that they are irrelevant to the order that the suits be tried together as they can always remain confidential even if a joint trial is ordered.

Findings And Decision

[8] The main objective in having the cases heard jointly is the saving of costs and time with the interest of the parties uppermost.

[9] It is clear to me that the plaintiff's claim in this court is essentially an enforcement of a claim in a simple contract to transport the plaintiff's supplies and materials from the shore to the oil rig in the open sea. It is also clear that in the main the plaintiff is enforcing the indemnity clause in art. 15 of the Vessel Hire Contract whereby the defendant is liable to indemnify the plaintiff in respect of any damages regardless of "whether it is foreseeable or unforeseeable, imposed or suffered by any party and irrespective of any action, inaction or negligence".

A **[10]** It is true that a joint trial may be able to resolve all the issues for all the parties in the two suits in one trial but this would necessarily means doing it at the expense of the plaintiff in this suit for its claim involved a simple straightforward enforcement of the indemnity clause under art. 15 of its agreement with the
B defendant. A joint trial would deprive it of its right to have its claim adjudicated upon soonest. It is inexpedient under the circumstance to have this case heard jointly with the Terengganu suit.

C **[11]** The application is dismissed with costs.

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